1792. While, however, the court held the motion under adviſement, it was voluntarily withdrawn, and the ſuit diſcontinued.*

Auguſt Term, 1792.

THE court being met, a commiſſion, appointing THOMAS JOHNSON one of the Juſtices, bearing date the 7th of *November*, 1791, was read; and he was qualified according to law.

OSWALD, Adminiſtrator, *verſus* the STATE of NEW-YORK.

SUMMONS. *Ingerſoll* moved for a rule on the marſhall of the diſtrict of *New-York*, to return the writ in this cauſe; and, after adviſement, THE COURT granted the rule in the following terms:

Ordered, That the marſhall of the *New-York* diſtrict return the writ to him directed in this cauſe, before the adjournment of this court, if a copy of this rule ſhall be ſeaſonably ſerved upon him, or his deputy, or, otherwiſe, on the firſt day of the next term. And that in caſe of a default, he do ſhew cauſe therefor, by affidavit taken before one of the judges of the *United States*.

The STATE of GEORGIA *verſus* BRAISLFORD, *et al.*

THIS was a bill in equity filed by "His Excellency *Edward Telfair*, Eſq. governor and commander in chief in and over the ſtate of Georgia, in behalf of the ſaid State, complainant;" againſt *Samuel Brailsford*, *Robert Wm. Powell*, and *John Hopton*, merchants and co-partners, and *James Spalding*, ſurviving partner of *Kelsall & Spalding*, defendants. The bill ſet forth the following caſe:—"That on the 4th of *May*, 1782, the State of *Georgia* being then free, ſovereign and independent, enacted a law entitled 'An act for inflicting penalties on, and 'confiſcating the eſtates of, ſuch perſons as are therein declared 'guilty

* But ſee the ſame ſuit *poſt*, and Grayſon *verſus* Virginia.

'guilty of treaſon, and for other purpoſes therein mentioned.' 1792.
That, among other things, this law contained the following clauſes:—'And whereas there are divers eſtates and other property within this State, belonging to perſons who have been declared guilty, or convicted, in one or other of the *United States*, of offences which have induced a confiſcation of their eſtates or property within the State of which they were citizens: Be it therefore enacted by the authority aforeſaid, that all and ſingular the eſtates both real and perſonal, of perſons under this deſcription, of whatſoever kind or nature, together with all rights and titles, which they may, do, or ſhall hold in law or equity, or others in truſt for them, and alſo all the debts, dues and demands, due or owing to Britiſh merchants, or others, reſiding in Great Britain, (which ſhall be appropriated as herein after mentioned) owing or accruing to them, be confiſcated to and for the uſe and benefit of this State, in like manner and form of forfeiture as they were ſubjected to in the States of which they reſpectively were citizens, and the monies ariſing from the ſales which ſhall take place by virtue, and in purſuance of, this act, to be applied to ſuch uſes and purpoſes, as the legiſlature ſhall hereafter direct.'

'And be it further enacted, that all debts, dues and demands, due or owing to merchants or others reſiding in Great Britain, be, and they are hereby *ſequeſtered*, and the comiſſioners appointed under this act, or a majority of them, are hereby empowered to recover, receive, and depoſit the ſame in the treaſury of this State, in the ſame manner, and under the ſame regulations, as debts confiſcated, there to remain for the uſe of this State, until otherwiſe appropriated by this or any future houſe of Aſſembly.'

'And whereas there are various perſons, ſubjects of the king of Great Britain, poſſeſſed of or entitled to eſtates real and perſonal, which juſtice and ſound policy require ſhould be applied to the benefit of this State; Be it therefore enacted by the authority aforeſaid, That all and ſingular the eſtates, real and perſonal, belonging to perſons being Britiſh ſubjects, of whatſoever kind or nature, which they may be poſſeſſed of, except as before excepted, or others in truſt for them, or that they are or may be entitled to in law or equity, as alſo all debts, dues, or demands, owing or accruing to them, be confiſcated to and for the uſe and benefit of this State, and the monies ariſing from the ſales which ſhall take place by virtue of, and in purſuance of this act, to be applied to ſuch uſes and purpoſes as the legiſlature ſhall hereafter direct.'

"That by the operation of theſe clauſes, all the debts, dues, and demands, of the citizens of *Georgia* to perſons, who had

1792. been ſubjected to the penalties of confiſcation in other States, and of Britiſh merchants and others reſiding in Great Britain, and of all other Britiſh ſubjects, were veſted in the ſaid State.

"That *James Spalding*, a citizen of *Georgia*, and ſurviving co-partner of *Kelsall & Spalding*, was indebted to the defendants in the penal ſum of £7058. 9ſ. 5d. upon a bond dated the of 1774, which debt, by virtue of the ſaid recited law, was transferred from the obligees and veſted in the State:—*Brailsford* being a native ſubject of *Great Britain*, conſtantly reſiding there from the year 1767 'till after the paſſing of the law; *Hopton*'s eſtate real and perſonal, (debts excepted) having been expreſsly confiſcated by an act of the legiſlature of *South Carolina*; and *Powell* coming within the deſcription of perſons, whoſe eſtates real and perſonal (debts excepted) were alſo confiſcated by acts of the legiſlature of *South Carolina*, if after refuſing to take the oath of allegiance, they returned to the State.

"That an action had been brought upon the bond, by *Brailsford*, *Powell* and *Hopton*, againſt *James Spalding*, as ſurviving partner of *Kelsall & Spalding*, in the circuit court for the diſtrict of *Georgia*, of term, 1791, in which action there was a plea, demurrer to the plea, joinder in demurrer, and judgment thereupon for the plaintiffs.

"That the State had never relinquiſhed its claim to this debt, but, on the contrary, had aſſerted it by divers acts of the Legiſlative, Executive, and Judicial, departments; and, particularly, by directing the Attorney General to apply for a rule, to be admitted to aſſert the claim, in all ſuits brought in any court, for debts within the deſcriptions of the confiſcation law above cited.

"That the Attorney General applied to the Circuit court for the admiſſion of the State, as a party, to defend its claim in the ſaid ſuit of *Brailsford and others verſus Spalding*, then depending there, which application was rejected; and that in that ſuit, as well as divers other ſuits, recoveries were had againſt citizens of the ſtate by Britiſh merchants, for debts within the deſcriptions of the confiſcation law, upon the ſole principle of debtor and creditor, and without any reference to the right and claim of the ſtate."

The bill proceeds to charge a confederacy between the parties to the ſuit in the circuit court to defraud the State; and that in purſuance thereof the plaintiffs had iſſued execution againſt the defendant, and the defendant had confederated with them not to take out a writ of error; ſo that the defendant's property will be levied on, and diſpoſed of, and the State will be defrauded of its juſt claim thereon.

The bill then ſuggeſts the general foundation for the juriſdiction on the equity ſide of the court;—puts the proper interrogatories;

rogatories;—and concludes with praying "that any levy, or far- 1792.
ther levies, under the ſaid execution, and any ſales in purſuance
of a levy, and any monies already raiſed, or that may be raiſed thereon, may be ſtayed in the hands of the marſhall of the ſaid Circuit court, by an injunction from this honorable court. And that the ſaid marſhall be directed to pay ſuch ſum, or ſums, raiſed as aforeſaid, to the treaſurer of the ſaid State of Georgia, to and for the uſe of the ſame, and that the ſaid James Spalding be decreed to pay to the ſaid treaſurer the balance which may be due on the bond aforeſaid for the uſe aforeſaid. And that the ſaid State may be farther or otherwiſe relieved, in all and ſingular the premiſes, as the nature and circumſtances of the caſe ſhall require, and as to the court ſhall ſeem meet."

With the bill, there was filed an affidavit, made by Mr. *John Wereat* (the agent for Georgia) affirming "that the allegations therein contained are true;" and *Dallas*, for the State, moved that an injunction might iſſue, to the Circuit court, to ſtay further proceedings, and alſo to the marſhall of the Georgia diſtrict, to ſtay the money in his hands, if he ſhould have levied, or ſhall levy, the ſame, on any execution iſſued in the cauſe of *Brailsford et al. verſus Spalding.*

The motion was oppoſed by *Randolph*, for the defendants; and after argument, the Judges delivered their opinions *ſeriatim*, on the 11th of *Auguſt*, 1792.

JOHNSON, *Juſtice.* In order to ſupport a motion for an injunction, the bill ſhould ſet forth a caſe of probable right, and a probable danger that the right would be defeated, without this ſpecial interpoſition of the court. It does not appear to me, that the preſent bill ſufficiently claims ſuch an interpoſition. If the State has a right to the debt in queſtion, it may be enforced at common law, notwithſtanding the judgment of the Circuit court; and there is no ſuggeſtion in the bill, though it has been ſuggeſted at the bar, that the State is likely to loſe her right by the inſolvency either of *Spalding*, the original debtor, or of *Brailsford*, who will become her debtor for the amount, if he receives it, when in law he ought not to receive, or retain, it.

Nor does the bill ſtate any particular confederacy, or fraud. The refuſal to admit the Attorney General as a party on the record, was the act of a competent court; and it is not ſufficient barely to alledge, that the defendant has not choſen to ſue out a writ of error.

The caſe might, perhaps, be made better; but as I can only know, at preſent, the facts which the bill alledges, and which the affidavit ſupports, it is my opinion, that there is not a proper foundation for iſſuing an injunction.

IREDELL, *Juſtice.* I ſat in the Circuit court, when the judgment was rendered in the caſe of *Brailsford and others verſus Spalding*;

1792. *Spalding*; but I ſhall give my opinion, on the preſent motion, detached from every previous conſideration of the merits of the cauſe.

The debt claimed by the plaintiffs below, was, likewiſe, claimed by the State of *Georgia*. The State applied to be admitted to aſſert her claim, but the application was rejected; nor has any writ of error been inſtituted upon the judgment. Theſe facts, however, are only mentioned to introduce this remark, that the Circuit court could not, with propriety, ſuſtain the application of *Georgia*; becauſe, whenever a State is a party, the Supreme court has excluſive juriſdiction of the ſuit; and her right cannot be effectually ſupported, by a voluntary appearance, before any other tribunal of the Union. Not being a party, nor capable of reſorting as a party, to the Circuit court, it is very much to be queſtioned whether the State could bring a writ of error on the judgment there, even if her claim appeared on the record.

Every principle of law, juſtice, and honor, however, ſeem to require, that the claim of the State of *Georgia* ſhould not be, indirectly, decided, or defeated, by a judgment pronounced between parties, over whom ſhe had no controul, and upon a trial, in which ſhe was not allowed to be heard. If, indeed, the court could not deviſe a mode, for admitting a fair inveſtigation and determination upon that claim, it would be uſeleſs to grant an injunction: But I think a mode may eaſily be preſcribed, in ſtrict conformity with the practice and principles of equity.

It was in the power of the defendant in the Circuit court, to have filed a bill of interpleader, in order, for his own ſafety, to ſettle the rights of the contending parties; but neither in that form, nor by inſtituting a ſuit herſelf, could *Georgia* have derived the benefit of ſupporting her claim in her own way, before any other than the Supreme court. In this court, therefore, we ought now to place the State upon the ſame footing, as if a bill of interpleader had been regularly filed here; which can be done by ſuſtaining the preſent ſuit; and when the parties are all before us, we may direct a proper iſſue to be formed, and tried at the bar. Thus, juſtice will be done to *Georgia*, and an irreparable injury may be prevented; while the adverſe party, even if he ultimately ſucceeds, can only complain of a ſhort delay.

With this view, I think, that an injunction ſhould be awarded to ſtay the money in the hands of the marſhall, till this court ſhall make a further order on the ſubject.

BLAIR, *Juſtice*. The State of *Georgia* ſeems to have done all that ſhe could to obtain a hearing. An application was made to the Circuit court, in the nature of a claim to interplead; but being refuſed, her alternative, under all the circumſtances of the caſe, is an appeal to the equitable juriſdiction of the Supreme court.

court. It is true, perhaps, as the counſel has ſuggeſted, that the defendant below pleaded the confiſcation act of *Georgia* in bar to the action; but it is a ſufficient anſwer to this argument, that the State was not a party; and no right can be defeated, in law, unleſs the party claiming it, has himſelf an opportunity to ſupport it. 1792.

If the State of *Georgia* was entitled to the bond, ſhe is equally entitled to the money levied by the marſhall in ſatisfaction of the bond, or rather of the judgment rendered upon it: And as the execution directs the marſhall to pay the amount to the plaintiffs below, I can perceive no other mode of preventing a compliance, while we enquire into the right of receiving the money, than that of iſſuing an injunction to ſtay it in the hands of the officer.

It appears to me to be too early, likewiſe, to pronounce an opinion upon the titles in colliſion; ſince it is enough, on a motion of this kind, to ſhew a colorable title. The State of *Georgia* has ſet up her confiſcation act, which certainly is a fair foundation for future judicial inveſtigation; and that an injury may not be done, which it may be out of our power to repair, the injunction ought, I think, to iſſue, till we are enabled, by a full enquiry, to decide upon the whole merits of the caſe.

WILSON, *Juſtice*. I confeſs, that I have not been able to form an opinion which is perfectly ſatisfactory to my own mind, upon the points that have been diſcuſſed. If *Georgia* has a right to the bond, it is ſtrictly a legal right; but to enforce a ſtrictly legal right, the preſent ſeems, at the firſt bluſh, to be an awkward and irregular proceeding. Again: *Georgia* had not a right, or ſhe had a right, to be admitted to a hearing in the Circuit court: but, in the former caſe, it would be no ground of complaint, that her application was rejected; for, ſhe is bound by the law; and in the other caſe, ſhe would be entitled to bring the ſubject before us, as a court of law; ſince ſhe was refuſed the exerciſe of a legal right.

It is true, that, under the Federal Conſtitution, an inferior tribunal cannot compel a State to appear as a party; but it is a very different propoſition to ſay, that a State cannot, by her own conſent, appear in any other court, than the Supreme court. The general rule applies among all ſovereigns, who, as equals, are not amenable to courts of each other; and yet I remember an action was inſtituted and ſuſtained, ſome years ago, in the name of *Louis* XVI. king of France, againſt Mr. *Robert Morris*, in the Supreme court of Pennſylvania.

Under theſe impreſſions, I am diſpoſed to think, that the State of Georgia ought rather to have ſued out a writ of error, than to have aſked for an injunction: But ſtill, in the exiſting circumſtances

1792. circumstances of the case, I have no objection to retain the money within the power of the court, 'till we can better satisfy ourselves both as to the remedy and the right.

CUSHING, *Justice.* The Judicial act expresly declares, that "suits in equity shall not be sustained, in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law." Now, if *Georgia* has any right to the debt in question, it is a right at law, for which, of course, the law will furnish a plain, adequate, and complete remedy. The decision of the Circuit court, in a case to which *Georgia* was neither party nor privy, did not, and could not, take away either the right or the remedy of the State. Nor can *Spalding*, the defendant below, be made liable twice, for the same debt, without his wilful *laches*. For, it is in his power to bring a writ of error; and then the whole merits of the claim of *Georgia* appearing on the record, we must decide it as a question of law, either by affirming or reversing the judgment, so as to bind us in any suit, which *Georgia* might institute for the same cause.

Besides, the State of *Georgia* (notwithstanding the judgment of the Circuit court) may bring an action of *indebitatus assumpsit* against *Brailsford* (who is a man of fortune), after they have received the money, upon the principle of *Moses versus M'Farland*, and with stronger reason; as in that case the parties, in both courts, were the same; but, in the case proposed, they would be different, and one of them has never been heard. In some form, therefore, *Georgia* may obtain compleat redress at law.

I do not, upon the whole, consider the refusal of *Spalding* to bring a writ of error (which he is not compellable to bring) nor any other suggestion in the bill, as a sufficient foundation for exercising the equitable jurisdiction of the court; and, consequently, I think that an injunction ought not to be awarded.

JAY, *Chief Justice.* My first ideas were unfavorable to the motion; but many reasons have been urged, which operate forcibly to produce a change of opinion.

The great question turns on the property of a certain bond;—whether it belongs to *Brailsford*, or to *Georgia?* It is put in suit by *Brailsford*; but if *Georgia*, by virtue of the confiscation act, is really entitled to the debt, she is entitled to the money, though the evidence of the debt happened to be in the possession of *Brailsford*, and though *Brailsford* has, by that means, obtained a judgment for the amount.

Then the only point to be considered is—whether, under these circumstances, it is not equitable to stay the money in the hands

hands of the marſhall, 'till the right to it is fairly decided; and ſo avoid the riſque of putting the true owner to a ſuit, for the purpoſe of recovering it back? 1792.

For my part, I think that the money ſhould remain in the cuſtody of the law, till the law has adjudged to whom it belongs; and, therefore, I am content, that the injunction iſſue.

An Injunction granted.*

HAYBURN'S CASE

THIS was a motion for a *mandamus* to be directed to the *Circuit Court* for the diſtrict of *Pennſylvania*, commanding the ſaid court to proceed in a certain petition of *Wm. Hayburn*, who had applied to be put on the penſion liſt of the *United States*, as an invalid penſioner.

The principal caſe aroſe upon the act of Congreſs paſſed the 23*d* of *March*, 1792.

The Attorney General *(Randolph)* who made the motion for the *mandamus*, having premiſed that it was done *ex officio*, without an application from any particular perſon, but with a view to procure the execution of an act of Congreſs, particularly intereſting to a meritorious and unfortunate claſs of citizens, THE COURT declared that they entertained great doubt upon his right, under ſuch circumſtances, and in a caſe of this kind, to proceed *ex officio*; and directed him to ſtate the principles on which he attempted to ſupport the right. The Attorney General, accordingly, entered into an elaborate deſcription of the powers and duties of his office:—

But THE COURT being divided in opinion on that queſtion, the motion, made *ex officio*, was not allowed.

The Attorney General then changed the ground of his interpoſition, declaring it to be at the inſtance, and on behalf of *Hayburn*, a party intereſted; and he entered into the merits of the caſe, upon the act of Congreſs, and the refuſal of the Judges to carry it into effect.

THE COURT obſerved, that they would hold the motion under adviſement, until the next term; but no deciſion was ever pronounced, as the Legiſlature, at an intermediate

* See the ſame caſe, *poſt.* & 3 *vol. p.* 1. as well on a motion to diſſolve the Injunction, as on a trial of the merits, upon a feigned iſſue.